Testimony of Laurence E. Gold*

Before the

Committee on House Administration

Hearing on the Regulation of 527 Organizations

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I appreciate the opportunity to testify before the Committee on current legislative proposals to further regulate or deregulate the American electoral process. I appear on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the national labor federation whose 13 million members in 57 national and international unions work in innumerable occupations throughout the 50 states. The AFL-CIO is one of the largest and most diverse membership organizations in our nation, and on behalf of all working families it maintains an acute interest and an active role in shaping public policy, seeking just and progressive legislation, and influencing – in the best sense of open and democratic participation – the selection of public officeholders.

Before this Congress, the AFL-CIO has a full plate of legislative concerns, from protecting Social Security to enhancing domestic manufacturing to increasing the minimum wage. These are perennial issues that go to the substance of what government does and what our society stands for. The labor movement's strength in pursuing this agenda derives from the involvement of its members and their families, their ability to join together, speak out and persuade their fellow citizens, and their commitment to securing government at all levels that embodies the principles they embrace.

For the labor movement, achieving that kind of government has always been a daunting struggle. American labor history is a saga of worker activism fighting powerful forces of organized capital and inhospitable laws that have defined various forms of collective self-help and public expression as civil offenses and even crimes. Over many years, unions have come to look at governmental controls on political participation very warily, and to appreciate the genius of the First Amendment as a guarantor of both individual liberty and group self-realization, grounded in faith in the common sense and independent judgment of ordinary people to make up their own minds without arbitrary controls over what and who they can hear, read or engage with.

The AFL-CIO has been actively involved for years in campaign finance regulatory issues because we recognize the huge stake of workers and other citizens in the rules adopted by elected officials and the regulators they select as to how citizens and

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organizations can participate in the political process – that is, the crafting of legislation and the conduct of elections. Unions and workers realize that their ability to have a voice in that process is as important as how they apply that voice; so, the labor movement was actively engaged in the legislative consideration of the Bipartisan Campaign Reform Act (BCRA) in 2001 and 2002, and we pressed to the Supreme Court our profound and deep-seated objections to how that statute criminalized certain union broadcast speech and redefined so-called "coordination" with federal candidates and political parties.

In that litigation we were aligned with what many observers – and many within Labor's own ranks – considered to be strange bedfellows, because numerous of our fellow litigants reflected the conservative side of the political spectrum and have routinely opposed our positions on the principal issues of the day. But we have no regrets over engaging in that battle, despite the grave disappointment of the narrow 5-4 Supreme Court majority in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

In enacting BCRA, Congress for the first time in the modern era enacted a law that prevents a union from undertaking certain public communications if they "refer" in any manner, and regardless of purpose or need, to a human being who is a federal candidate in an upcoming federal primary, convention or general election. And, Congress simultaneously rejected Federal Elections Commission (FEC) regulations, with troubling instructions about how to rewrite them, that struck a reasonable balance in defining a most difficult and important matter – the circumstances under which engagement with a federal candidate by a private citizen or organization, including a union, that entails that individual or group also engaging with the public, amounts to an "in-kind contribution" to that candidate subject to source prohibitions and amount limits.

These aspects of BCRA struck the AFL-CIO, and many others across the political spectrum, as misguided and overreaching efforts to control private associational conduct and speech that Congress had no warrant to interfere with – and it seemed to us that Congress, as a class of elected incumbents who enjoyed all the inherent electoral advantages of that status, had a huge self-interest in limiting the ability of private groups to voice criticism of them and their official conduct. We feared that if these novel restrictions were codified and held to be constitutional, then the path would be laid for further such restrictions, either in the interest of further protecting incumbents as a class; at the insistence of the lobby of self-styled campaign finance "reformers" whose regulatory agenda has no bounds; or in the particular service of a political party that – unlike the situation in 2001 and 2002, but the situation today – firmly controlled the Executive Branch, the House and the Senate at the same time.

The AFL-CIO took no solace during the BCRA debates in various estimations and assurances that restrictions on independent speech and associational activity would fall more burdensomely on our adversaries than on ourselves and our allies. We believe that approach to the regulation of political activity is gravely flawed in principle: we cannot accede to suppression of our rights because the suppression of others we dislike might be even more severe.

Moreover, as a practical matter, neither we nor others are such seers as to be able to predict the relative impact of such restrictions even in a current election cycle, let alone in years ahead. So, while partisans may be tempted to change the rules out of such calculations, we are confident only of the law of unforeseen and even confounding consequences in the regulation of political activity. It is best, then, to let all voices be heard and to encourage free associational activity.

During the BCRA debate and the ensuing litigation, we also realized that the issues at stake concerned not only the relative rights of unions and business corporations, which federal campaign finance law has sought in some measure to equate, but also the relative rights of other grassroots and membership organizations that are treated under FECA as "corporations" as well. It is our abiding view that federal election law should foster, through relatively less regulation, the political activities of membership groups, at least insofar as they derive their income from individual dues and contributions, regardless whether their status is a union, a non-profit corporation or an unincorporated association.

We also believe that the law must recognize a fundamental distinction between the transfer of cash or in-kind services from private sources to politicians and the political parties that nominate and support them, on the one hand, and speech, activism, advocacy and mobilization that occurs independently of politicians and parties – albeit "influential" of their official conduct and their legislative and electoral fortunes. The former – the class of contributions – plainly has directly corrupting potential, and its deregulation favors those enjoying the greatest means to give without necessarily reflecting proportional popular support. However, the latter – the class of civic engagement – cannot "corrupt" officeholders, is undertaken by the powerful and the powerless alike in unpredictable shares and popular impact, and is what the First Amendment most fundamentally protects.

All this is a rather long but I think necessary predicate to the topic at hand – namely, with just one election cycle of experience with BCRA, should Congress again entertain major statutory changes in the Federal Election Campaign Act (FECA)? And, if so, what should they be?

This hearing arises because, inevitably, there was a redistribution of political activity in BCRA's wake. This was both prompted by BCRA's new prohibitions and driven by happenstance during the 2004 election cycle, including a competitive presidential election involving *this* particular president and the two main national parties operating at *that* particular time, a general sense that narrow congressional majorities might be either flipped or fortified, the galvanizing issues of war and economic uncertainty, and a renewed sense of opportunity for grassroots endeavors that could mobilize people to participate in state and local electoral processes as never before.

One of the political channels that was pursued to an unprecedented degree was the independent, non-connected, non-federal Section 527 organization, and this channel

helped produce a level of voter participation unmatched in a generation. But these groups were not novel ventures. Well before the "reform" lobby, some editorial writers and some segments – but by no means all – of the governing national party endeavored to turn an obscure three-digit Internal Revenue Code designation into a four-letter word, like-minded persons with shared goals had combined in these legally sanctioned vehicles in order to participate in the political process.

In fact, and of great import to the matters now before this Committee, many longstanding non-federal "527" entities are separate segregated political funds that Section 501(c) non-profit organizations themselves create and control due to the explicit incentives of federal tax law and the explicit advice of the IRS since 1975 that establishing and using such Section 527 funds for electoral activity is necessary in order for a tax-exempt Section 501(c) organization to remain tax-exempt; that is, to avoid a tax that other Section 527 organizations – including national, state, and local political parties, and federal, state, and local candidates – do not incur. The IRS recently reiterated these concepts in issuing Revenue Ruling 2004-06 in January 2004 to provide some guidance as to how they should choose to finance certain public communications from their 501(c) and 527 accounts.

Accordingly, the AFL-CIO and many national and other unions, which are Section 501(c)(5) organizations, as well as Section 501(c)(6) trade associations and Section 501(c)(4) advocacy groups of many political stripes have long maintained Section 527 accounts that "primarily" engage in what Section 527 terms "exempt function" activity – that is, receiving and spending money in order to influence who fills elective and non-elective governmental and party positions. This activity includes contributions, independent advocacy, voter mobilization, donations to allied organizations, and other endeavors.

For a Section 501(c) organization, whether or not to use its 527 account for a particular matter is often subject to somewhat informed guesswork due to the imprecise scope of Section 527 itself. But these political accounts are very important and useful outlets for Section 501(c) organizations so that they and their members may fully and affordably participate in public life.

For years, however, unlike federal political committees and unlike other non-federal political committees operating in many states – all of which too are Section 527 organizations, of course – many of these Section 527 organizations (whether independent or Section 501(c)-sponsored), like much of the rest of the non-profit sector, undertook their activities without having to disclose the sources of their income and the recipients of their spending.

Congress, at the behest of Senator McCain and others, changed all that in June 2000 – nearly two years *before* BCRA, and in response to concerns expressed by some that these Section 527 groups were "stealth PACs," that is, political groups from which the law required no disclosure. Congress enacted a major new disclosure law, Pub. L. 106-230, that compelled them to register and file reports modeled on the FECA reporting

scheme for federal PACs, but Congress deliberately imposed no further restrictions on how these organizations actually could raise and spend their money. Throughout the subsequent intense and thorough ventilation of campaign finance problems that produced BCRA, there was further concern or change required of the operations of these familiar and now very transparent organizations. In fact, shortly after BCRA was enacted, Congress in November 2002 revisited the 2000 disclosure law and *relieved* many such groups of duplicative reporting obligations to the Internal Revenue Service (IRS) because they already disclosed their finances to one or more states. See Pub. L. 107-276.

During 2004, however, when these 527 organizations were next active, there arose a tremendous hue and cry, again principally from the "reform" lobby, which now contended that, in fact, these groups had been unlawful for 30 years - - ignoring that Congress had just legislated in 2000 and 2002 as if the contrary were true, and that no court or FEC decision had so held in all those years, including, of course, the Supreme Court in *McConnell*. As various Section 527 groups became more and more successful in attracting donations and volunteers, they came under increasing attack from the "reformers" and the groups' political adversaries.

Unfair and hyperbolic as these attacks have been, the point should not be lost that in all that has been written about the "527" issue in the last year and a half, and in all the verbal bombast that has emanated from opponents of the independent 527 groups, there has been virtually no complaint or case attempted against how Section 501(c) groups use their Section 527 funds. Yet H.R. 513, "The 527 Reform Act of 2005" ("The 527 Bill"), as I elaborate below, treats those Section 527 accounts with the same leaden hand as it does independent, non-connected Section 527 groups.

The 527 Bill would take to an unprecedented new level the seemingly endless campaign by some to impose federal PAC constraints – contribution source prohibitions and limits, registration and reporting, and subjection to FEC audits and enforcement – on any activity that might somehow "influence" a federal election. The capacity to influence, however, is a highly elastic concept and in itself can never suffice to warrant statutory restriction. Policy, legislation and elections do not come in neat and separate boxes, and their respective pursuits most assuredly affect each other – sometimes by design, sometimes not, and sometimes as intended, sometimes not. Importantly, the Internal Revenue Code recognizes this, by according, variously, Section 501(c) or Section 527 status to organizations that "primarily" engage in particular kinds of activities, and not precluding them from undertaking activities that are the primary aspect of another non-profit status (with the single exception of an absolute ban on charitable and educational Section 501(c)(3) groups engaging in electoral activity because contributions to them are, uniquely in the non-profit sector, tax-deductible).

That electoral and legislative concerns overlap hardly needs illustration, but here is a current example. More than 18 months before the next federal general election, we are in the midst of a great national debate over the future of Social Security. Could its content and outcome influence that election? President Bush thinks so; as reported by the *Washington Post* on March 23, "[f]lanked by Republican Sens. Pete V. Domenici (N.M.)

and John McCain (Ariz.), Bush invited Democrats 'to come to the table' to help devise a solution to shore up Social Security's finances. 'I believe there will be bad political consequences for people who are unwilling to sit down and talk about the issue,' he said."

Whether the President's estimation of the public's eventual judgment proves right or wrong, who could dispute the broader point that the Social Security battle could influence how people vote in November 2006 – and in primaries that start next spring – and that many participants in this battle are mindful of that and take that possibility into tactical account? Should that debate, then, be waged only by federal PACs? And, should Members of Congress – almost all of whom are "candidates" at all times under the FECA definition -- that collaborate with private groups in order to advance their Social Security legislative goals be subject to federal election law coordination rules? Surely not, but that is because common sense tells us that we cannot over-characterize and then restrict political activity as federal election-related activity without unduly infringing on basic rights and the public interest in active democratic engagement.

A related and equally uncontainable notion that inspires the 527 Bill is that independent spending can unduly influence officeholders, so it must be constrained. Under this view, federal officeholders that know about efforts by independent groups will be grateful to them, and thereby amenable to using their official positions to reward them. This rationale arises far afield from the core anti-corruption focus of BCRA on soft money that was passed directly from private sources to federal candidates and political parties. Like the vague notion of "influence" itself, concern over potential legislator gratitude for observed external behavior cannot justify restrictions on speech and association, for it is susceptible to no limiting principle once the line of independent activity has been rejected as a bar to regulation.

Contrast this, again, with federal officeholders who work directly with individuals, groups and lobbyists to advance common legislative and policy goals that demonstrably and even designedly redound to their electoral benefit. Indeed, the sponsors of H.R. 513 are working hand in hand with the "reform" lobby that regularly extols their sponsors' virtues, announces the sponsors' next moves on their websites, and represents them in litigation against the FEC to invalidate the rules promulgated under the legislation that they last sponsored. Why is that not "influence" of a more direct and undesirable sort than the *uncoordinated* private speech and association that proponents of the 527 Bill condemn and seek to outlaw? And if such collaboration is acceptable and even desirable, how can the *absence* of collaboration exert more, and undue, influence?

The argument in favor of "cracking down" on Section 527 groups is usually also expressed with disdain for the speech of some of them: for example, the "attack ads" by The Media Fund and Swift Boat Veterans for Truth, which are castigated as "negative" and coarsening of the political process. Plainly, legislation to silence such groups is not serving the goal of preventing corruption or anything like it. Rather, the goal is to prevent disfavored speech, pure and simple. But this is an illegitimate legislative quest under the First Amendment, and it is doomed to failure in any event: after all, neither the

"stand by your ad" candidate disclaimer requirements added by BCRA nor the other advertising disclaimer requirements in FECA caused the 2004 election-cycle advertisements by the hard-money funded federal candidates and national parties to "go positive." Yet it is these candidates who would legislate away others' "negative" commentary about themselves if they passed the 527 Bill.

Another flawed argument that is advanced for the 527 Bill is that the same hard-money rules should apply to non-federal Section 527 groups as apply to federal candidates and political parties. This facile appeal makes a false equation. A federal candidate campaign is devoted exclusively to winning a federal election, a candidate is susceptible to corruption, and society has a direct stake in preventing the corruption of public officeholders. But an independent 527 group need only be "primarily" concerned with influencing elections of any kind, it cannot corrupt candidates or parties from which it acts independently, and in no materially relevant manner can the group itself be "corrupted," for it exercises no governmental authority whatsoever.

The AFL-CIO strongly opposes the 527 Bill, H.R. 513, both because it is predicated on these misconceived premises and goals and because it would adversely affect our democracy in significant ways. The 527 Bill has nothing to do with limiting the flow of money or in-kind services to candidates or parties – the class of contributions, which is susceptible to corruption. Rather, it attacks the class of civic engagement, substantially enlarging upon BCRA's ban on certain union- and corporate-funded broadcasts by targeting individuals and groups – no longer limited to unions and corporations – that band together in the 527 organizational form in order to influence politics and policy, or to register voters or get them out to vote, while operating completely independently of candidates and parties and publicly disclosing their receipts and spending.

The 527 Bill goes far beyond BCRA in preventing these activities from happening *anywhere, almost any time and by any means* by a 527 unless it's carried out by the most stringently regulated creature of federal election law – the federal PAC. And, in doing so, the 527 Bill both restricts the political activities of Section 501(c) organizations in significant new ways and plainly lays the groundwork for the next stage of "reforming" how Section 501(c) groups may operate.

In sum, the bill would:

- Sharply curtail the ability of individuals and groups to associate in the pursuit of political and policy goals, even completely independently of candidates and parties, and with full public disclosure of their receipts and spending, by outlawing many non-federal Section 527 organizations;

- Force tax-exempt Section 501(c) organizations – unions, advocacy groups, non-profit corporations and trade associations – to finance substantially more of their communications about federal officeholders and voter

mobilization either through federal PACs or through *taxable* general treasury spending;

- Mandate for the first time that independent groups use hard money for mere "references" to federal candidates and political parties in public communications, and in voter registration and get-out-the-vote activities – going far beyond current law, which requires them to use hard money only for contributions, "express advocacy" messages and union or corporate broadcast "electioneering communications";

- Skew federal election law in favor of business corporations over unions and other Section 501(c) non-profit groups because businesses typically can continue to spend for political purposes in tax-neutral ways, while non-profits that are denied the use of their non-federal political accounts will be taxed at the highest corporate tax rate on the lesser of their political spending or investment (interest) income.

- Unjustly turn state and local PACs into federal PACs if they spend over $1,000 to publicly comment on the official conduct of federal officeholders or undertake most partisan or non-partisan voter registration or get-out-the-vote activities, and otherwise force them to rely on a parent organization's federal PAC to fund many of their public "references" to political parties; and

- Divert much political activity from transparent Section 527 groups to Section 501(c) groups, which – other than unions – have mostly confidential finances, and this inevitably will lead to unjustified demands that those Section 501(c) groups' (and, no doubt, unions') general treasury fundraising and spending be targeted even more directly in order to extinguish all "soft" so-called "election-influencing" activity.

Let me next specify how the 527 Bill would affect Section 527 organizations in general, and then address how it implicates the legitimate concerns of unions and other Section 501(c) organizations that sponsor many of the 527 accounts. As to 527 groups in general:

A. **The 527 Bill converts *every* 527 (either registered with the IRS as a 527 or otherwise "described in" Section 527) into a federal PAC *unless* it falls within a narrow exception** – it either receives less than $25,000/yr. or deals "exclusively" with non-federal elections, non-federal candidates, non-elected offices or ballot measures. The Internal Revenue Code's tax exemption for political activity will be effectively withdrawn from a broad range of organizations that now fall under it, even though that exempt status is not a "loophole" but, as I have noted, an integral aspect of how federal tax and election laws have operated in harmony for 30 years.

B. **The bill effectively imposes an "any purpose" test for federal PAC status--contrary to the "major purpose" requirement judicially imposed in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)**--because it withholds its exception from federal PAC status from most 527s that spend over $1,000 either to "promote, support, attack or oppose" ("PSAO") a federal candidate at *any* time within a year before a general election, or for "voter drive activity"--even if totally non-partisan--during substantial periods of time before a federal election. Because the major-purpose limitation is both necessary to sound policy and constitutionally required under *Buckley*, its abandonment makes no apparent sense whatsoever.

C. **The bill fails to define PSAO or even restrict it to speech that refers to candidacy or elections.** Communications that express opinions about incumbent federal officeholders' official conduct, policy positions or legislative votes could convert a 527 speaker into a federal PAC. For example, if the bill were in effect during 2003-04, commentary about "the President's" policies from November 2, 2003 to November 2, 2004, would have turned a Section 527 group into a federal PAC. Likewise, a voter guide that indicates its sponsor's public policy views, and therefore inferentially suggests which candidate positions the guide's sponsor prefers, could be prohibited speech for a non-federal Section 527 group.

D. **The bill also forces 527s to operate as federal PACs if they are dedicated to voter mobilization**--registration, GOTV or voter ID, no matter how non-partisan or issue-oriented (rather than candidate-or even party-oriented) their activities are. But these are worthwhile activities, and in 2004 were vital to inspiring millions of people to vote.

E. **The 527 Bill will directly impair the ability of individuals and groups to associate for political, legislative and policy purposes.** The bill eliminates a substantial range of uses of the 527 organizational form with its new triggers for federal PAC status: dealing to *any* degree with federal candidates or elections, or spending just $1,000.01 on "PSAO" communications or "voter drive activity." The Supreme Court has repeatedly upheld an individual's First Amendment right to spend as much as he or she wishes to convey any electoral message, including about federal elections, independently of candidates and parties. Wealthy individuals will still be able to finance whatever political activity they wish – they'll just hire others to carry it out. But the 527 Bill prohibits people who can't afford to self-finance from pooling that same spending together if their message might influence a federal election.

F. **The bill targets substantial political, legislative and policy spending despite the fact that it occurs completely independently of candidates, officeholders and political parties.** Again, the 527 Bill moves the campaign to eliminate "soft money" away from redressing actual potentially "corrupt" influences associated with the private giving of soft money to candidates and parties. Instead, with demonizing characterizations of supposedly sinister "527s" and of virtually all political activities as "soft money influence," this bill targets the pooled and fully publicly disclosed efforts of

individuals, unions, membership groups, and other associations to advance common political and social causes independently of candidates, officeholders and parties.

G. **The bill leaves the financing of voter drive activity by supposedly corruptible state and local political parties *less* regulated than the financing of the same activity by independent groups that pose no danger of corruption.** That's because (subject only to state law) the parties can solicit and use union, corporate and individual contributions up to $10,000/yr. for what the 527 Bill terms "voter drive activity," but if a Section 527 group spends even $1,000.01 on the same activity, it must operate as a federal PAC, with union and corporate contributions prohibited, and individual contributions capped at $5,000/yr.

H. **The bill sponsors explicitly admit that they want to outlaw 527s in order to insulate incumbent officeholders from criticism and electoral risk.** "[Sen.] McCain said that lawmakers should support the bill out of self-interest, because it would prevent a rich activist from trying to defeat an incumbent by diverting money into a political race through a 527 organization. 'That should alarm every federally elected Member of Congress,' he said." *Washington Times* (Feb. 3, 2005). The 527 Bill will only further enhance the power and voices of elected officials at the expense of their constituents and those affected by their official actions.

I. **The 527 Bill predicates federal PAC status on the application of important but unexplained concepts.** For example:

1. What do "election or nomination activities" include? These terms are new to federal election law.

2. What does "relate exclusively" mean? In *Buckley v. Valeo*, 424 U.S. 1 at 40-44, the phrase "relative to" was construed to be limited to express advocacy in order to avoid unconstitutional vagueness; must "relate exclusively" be construed the same way? If not, what *does* it mean, and how can we know for sure?

3. Must the FEC treat the components of "voter drive activity" – "voter registration activity," "voter identification," "get-out-the-vote activity" and "generic campaign activity" – as meaning the same as these identically worded components of "federal election activity" in 11 C.F.R. § 100.24(a)? If not, how broadly might they sweep?

The 527 Bill directly impairs the legitimate interests of Section 501(c) organizations as well:

A. **Due to its expanded definition of "political committee" and its onerous new allocation requirements, the 527 Bill invites increased scrutiny of and enforcement against Section 501(c) groups that engage in political and legislative**

activity through their federal and non-federal political accounts. Particularly at risk are advocacy groups, unions and trade associations, but charities as well are plainly not immune.

B. **The 527 Bill will curtail or eliminate the practice of Section 501(c) organizations using separate segregated non-federal Section 527 accounts funded by their regular treasury funds in order to make tax-exempt political disbursements.** Again, since 1975 federal tax law and the IRS have encouraged this practice so that tax-free investment income doesn't finance political activity; these accounts are not "evasions" of federal election law. But the 527 Bill will mandate that non-profit groups conduct their operations otherwise, for any of three reasons:

1. *First*, the 527 account will be treated like any other Section 527 organization, forced to operate as a federal PAC unless it satisfies one of the new narrow exceptions (receipts less than $25,000/yr., confined to non-federal elections, etc).

2. *Second*, even if the 527 account *does* satisfy one of these exceptions, in order to allocate spending with a federal PAC as a "qualified" non-federal account, the 527 account's money must be "raised only from individuals" and it "may not accept more than $25,000 from any one individual in any calendar year." This apparently means that even a Section 501(c) membership organization could *not* fund its non-federal Section 527 account with general treasury funds comprised of individual dues receipts.

3. *Third*, under the new "allocation" requirements for federal and "qualified" non-federal 527 accounts of Section 501(c) organizations, the federal PAC must finance a substantial share of the political activity anyway, ranging from 50% to 100%, depending solely on whether and when public communications or voter drive activity "refers" in any manner or context to federal candidates, political parties or non-federal candidates.

C. **But the 527 Bill might be read also to prevent Section 501(c) groups now from using their general treasury accounts for public communications or voter drive activities that "refer" to federal candidates or political parties.** That's because the bill's "allocation" provision states that the Section 501(c) "connected organization" of a federal PAC and a qualified non-federal account can pay for their administrative and fundraising expenses--but the bill does *not* likewise provide that the connected organization can pay for public communications or voter drive activity that "refers" to federal candidates or political parties, and instead authorizes only the separate political funds to spend for those purposes. If so interpreted, Section 501(c) groups will be barred immediately from pursuing their usual advocacy and voter engagement work – unless they do so through separately funded, highly regulated political accounts.

D. **Even if that reading is rejected, the 527 Bill will force Section 501(c) organizations to finance much more political and legislative activity than they do**

now either through (a) a federal PAC or (b) taxable general treasury spending. As indicated earlier, that's because if the IRS considers a Section 501(c) group's general treasury spending to be election-influencing (so-called "exempt function" activity), the group must pay a *35% tax* on that spending (or the general treasury account's investment (interest) income, whichever is less) under Section 527(f)(1). The Internal Revenue Code enables Section 501(c) groups to influence elections without paying that tax if they use a non-federal Section 527 account and publicly report its finances. But the 527 Bill upsets that system by sharply reducing the permissible uses of those accounts, forcing the spending instead into federal PACs or taxable general treasury spending or – as will likely often happen – chilling the activity entirely.

E. **The 527 Bill will skew FECA in favor of business corporations over unions and other non-profit groups, upsetting the historic balance of federal election law.** The bill fosters imposition of the 35% "penalty tax" on Section 501(c) groups while leaving corporate tax rules on businesses unchanged. Unlike non-profit organizations, businesses have no need to create treasury-financed Section 527 accounts as a prerequisite to funding their political activities; rather, they may use their corporate general treasuries without incurring a tax in doing so. Although most business political expenditures are non-deductible, this is inconsequential for corporations that owe little or no tax through other accounting devices or that experience an overall loss for tax purposes; and, the corporate tax is graduated from 15% to 35% as a function of the amount of net income. For a business that is economically indifferent to whether its next spending is tax-deductible, a decision to spend on politics is tax-neutral under the Internal Revenue Code.

By contrast, as discussed, a Section 501(c) group compelled by the 527 Bill to use its general treasury account for political spending, which previously could have been effected through its Section 527 account *without* being taxed, will face a penalty tax at the highest 35% rate. And, as a tax on *spending*, this tax will apply irrespective of whether the group has any actual net income, and it will have no offsetting deductions.

F. **And, the FEC could deem a Section 501(c) organization itself to be "described in Section 527" and required to operate as a federal PAC.** That's because the bill adds to the FECA definition of a federal political committee "any applicable 527 organization," that is, "an organization described in Section 527 of the Internal Revenue Code," regardless of whether it has registered with the IRS as a 527 group or the IRS has determined that it is one. With the IRS standards for Section 527 status unclear as it is, giving the FEC independent authority to determine that status could lead to Section 501(c) groups not just being liable for taxes under the Internal Revenue Code but also being subjected to the organizational and funding strictures and penalties of FECA

In fact, the bill explicitly provides the FEC with an end-run around the "major purpose" requirement for federal PAC status that has bound federal campaign finance regulation since *Buckley*. An organization (however it portrays itself) that is "described in" Section 527, and that doesn't meet one of the narrow exceptions to "applicable 527 organization" status – say, because it spent $1,000.01 out of a million-dollar budget on a

newspaper advertisement in Washington, DC that criticized the new "McCain-Feingold" bill within a year of either Senator's next election – could only operate as a federal PAC, even though it indisputably had no "major purpose" to influence any federal election.

G. **The 527 Bill could prohibit or at least chill donations by unions and other non-profit groups to civil rights and other organizations that engage in voter registration and GOTV activities, even if non-partisan.** With non-federal 527 accounts placed off-limits for "voter drive activity," donors in the non-profit community may have to use their federal PACs (if they have them and can afford this) or risk making taxable donations from their general treasuries to sustain these important civic efforts.

H. **The 527 Bill invites further regulation of Section 501(c) groups if the bill causes associational activity that was conducted through transparent Section 527 organizations to be undertaken instead through them.** A September 2004 Public Citizen report pejoratively labeled Section 501(c) groups – including unions, trade associations and both liberal and conservative advocacy organizations – "the new stealth PACs" because some of their activities (cited examples include legislative advocacy and membership communications) can influence elections with little or no disclosure. In the "reform" lobby's worldview, this is intolerable and must be remedied through forced conversion to federal PAC status.

Notably, none of Public Citizen's four co-signers of a March 7, 2005 statement endorsing H.R. 513's identical Senate version, S. 271 – the Campaign Legal Center, Democracy 21, Common Cause and the League of Women Voters – has taken issue with Public Citizen's "stealth PAC" analysis of Section 501(c) organizations. Yet these groups – contrary to the plain text of H.R. 513 and the logic of their own arguments in favor of the bill – deny that the bill will either affect Section 501(c) groups or portends further regulation of them. In truth, the 527 Bill is another significant step down a classic slippery slope that leads inexorably to the general treasury funding and spending of Section 501(c) groups themselves.

I. **The new "affiliation" rule for "qualified" non-federal accounts for the first time will impose on non-federal accounts sponsored by any branch of a Section 501(c) organization the same affiliation rules currently applicable to their federal PACs.** Yet while most national organizations with state and local affiliates collectively maintain just one or a few federal accounts, they typically sponsor many non-federal accounts in various states and localities, subject to the different state laws. These state-based funds usually operate very autonomously from each other. But the new affiliation rule will compel an unpredictable and burdensome legal aggregation of these non-federal accounts if the Section 501(c) organization and its branches wish to avoid using 100% hard money and instead to "allocate" their political spending.

J. **Because of this new affiliation rule and the individual-only funding requirement for "qualified" non-federal accounts, Section 501(c) organizations will have to create and maintain both "qualified" and other (not "qualified") non-federal accounts – assuming that the 527 Bill would even permit that – in order to**

preserve some ability to do much political spending. But this would be administratively complex and would still not avoid the significant, new dependence on hard money for non-electoral activities that the 527 Bill mandates.

K. **The allocation rule will prevent state and local PACs sponsored by branches of Section 501(c) organizations from "referring" in a public communication or "voter drive activity" to political parties in a federal election year--even endorsing "John Smith, Democrat for Mayor"--unless they are funded with individual money and secure at least 50% of the cost of the "reference" from the parent Section 501(c) organization's federal PAC.**

The AFL-CIO has also carefully reviewed H.R. 1316, "The 527 Fairness Act of 2005." Unlike the 527 Bill, H.R. 1316 has the virtue of seeking to encourage more participation in the political process. As written, however, the bill focuses on relaxing the "contribution" side of federal regulation rather than what I have called the "civic engagement" side. So, for example, it would uncap the current, two-year $101,400 individual aggregate federal contribution limit; index contributions to and from federal PACs to inflation; uncap political party coordinated spending with candidates; and accord trade association PACs greater access to potential contributors from corporate ranks. On the civic engagement side, unions, advocacy groups, and trade associations could undertake broadcast "electioneering communications" by raising individual funds without doing so through federal PACs, and state party committees could use non-federally restricted funds for voter registration near elections and some sample ballots.

As far as H.R. 1316 goes on the civic engagement side, the AFL-CIO would consider it a very modest improvement over current law. But the contribution-side changes are plainly more problematic, though some might be acceptable in the context of a different mix of amendments to FECA.

If the FECA debate is to be reopened so soon after BCRA, let us explore all aspects of the statute and not be artificially confined to topics chosen by particular bill sponsors. We would urge consideration of a variety of ideas - - for example, enabling membership organizations to use individual, dues-based funds for "electioneering communications" (which H.R. 1316 does not now appear to do); eliminating from the realm of unlawful "coordination" the actually uncoordinated conduct of common vendors and successive employees; enhancing the contribution options for small-donor federal PACs; modernizing the presidential public financing system; constraining the remaining lawful avenues of actual soft-money donations at the national level, namely, national party conventions and presidential inaugurations; and enhancing disclosure requirements concerning "bundlers" of federal contributions.

In short, if we are to have this debate, let us undertake some hearings focused not on particular bills, but on all appropriate ideas, principles and goals for formal regulation of politics. And, especially in this period of one-party control, Members should agree to proceed only on the basis of a significant bipartisan consensus. It is important to consider that the original enactment of FECA and every significant amendment of it occurred in a

period of divided party control of the national government. A constructive engagement by this Congress with individuals and groups that are most directly regulated now or that could be subject to new regulatory proposals must include assurances that the process will be open and fair in each body and in any conference committee.

Again, I appreciate your consideration and welcome your questions.